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No. 90-7675

In The

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Minnesota

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. May a local government enact a content-based, "hate-crime" ordinance prohibiting the display of symbols, including a Nazi swastika or a burning cross, on public or private property, which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender" without violating overbreadth and vagueness principles of the First Amendment to the United States Constitution?

2. Can the constitutionality of such a vague and substantially overbroad content-based restraint of expression be saved by a limiting construction, where the language of the ordinance provides no core of "easily identifiable and constitutionally proscribable expression," restricting its application to "fighting words" or "imminent lawless action?"

LIST OF PARTIES

The petitioner is R.A.V., a juvenile who was 17 years old on June 21, 1990, the date of the allegations. His initials are used because of the confidentiality of juvenile proceedings under Minnesota law. Respondent is the City of St. Paul, Minnesota.

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B. *MEMO*, dated July 10, 1990, Issue: Constitutionality of St. Paul City Ordinance section 292.02, submitted by Edward J. Cleary B-1

C. *MEMORANDUM*, dated July 13, 1990: State's Oral Argument C-1

[1] The written materials submitted to the trial court were not included in the Joint Appendix because they were not in the district court or appellate court files. The trial court did, however, specifically make these materials part of the record. (J.A. 21). Counsel agreed that these materials should be appended to the brief on the merits so that this Court would be able to review these materials if it chooses to do so.

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OPINION BELOW

The opinion of the Minnesota Supreme Court (J.A. 44-52) was reported at 464 N.W.2d 507 (Minn. 1991). The opinion of the district court (J.A. 28-35) was not reported.

JURISDICTION

The Minnesota Supreme Court entered judgment on February 27, 1991. (J.A. 53). R.A.V. filed a petition for writ of certiorari and motion to proceed *in forma pauperis* in this Court on April 11, 1991. This Court granted the petition and motion on June 10, 1991 (J.A. 54). Jurisdiction of this Court is invoked pursuant to section 1257 (a), Title 28, United States Code.

STATUTES INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section One, Fourteenth Amendment To The United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

St. Paul City Ordinance section 292.02: Disorderly Conduct:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

STATEMENT OF THE CASE

On June 21, 1990, between 1:00 a.m. and 3:00 a.m., it is alleged that some small crosses, made of wooden chair legs held together by tape, were burned on the property of an African American man in St. Paul by some young males. At issue before this Court is the amended petition, filed in Ramsey County District Court, Juvenile Division, on July 5, 1990, which alleges in Count II that R.A.V. and others engaged in disorderly conduct by placing a burning cross on private property knowing or having reason to know that that action would arouse anger, alarm, or resentment in others on the basis of race or color. (J.A. 10).

On June 25, 1990, the Ramsey County Attorney's Office filed a delinquency petition against R.A.V., alleging that he, together with others, committed assault under state statute (Count I) and city ordinance (Count II)[2]. (J.A. 2). R.A.V. appeared in court on that day, denied the petition, and was held in custody.

On July 5, 1990, the state dismissed the charge of assault (Count II) under the city ordinance and substituted a new charge alleging petitioner committed the offense of disorderly conduct (bias-motivated, misdemeanor) pursuant to St. Paul City Ordinance section 292.02 (J.A. 8, 10).[3] Petitioner requested a hearing to challenge the constitutionality of this ordinance. The parties briefed and argued the issue before the Ramsey County District Court on July 13, 1990. (J.A. 13-27). In its brief and at argument, the state conceded that the ordinance proscribed expressive conduct. (J.A. 22); (App. C-1).[4] On July 16, 1990, the district court judge held that St. Paul City Ordinance section 292.02 was unconstitutional. (J.A. 32).

The state appealed this decision, (J.A. 36), and filed a Petition for Accelerated Review by the Minnesota Supreme Court. (J.A. 40). The Minnesota Supreme Court granted this Petition for Accelerated Review on August 3,

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[2] The petition alleged that R.A.V. committed the offenses of Count I assault in the fourth degree (bias-motivated, gross misdemeanor) pursuant to state statute and Count II assault (bias-motivated, misdemeanor) pursuant to St. Paul city ordinance. (J.A. 2).

[3] Count I of the amended petition again listed violation of the state assault statute, Minnesota Statutes section 609.2231(4) which is punishable by up to one year in jail and/or a $3000.00 fine. This charge was not challenged and is still pending against petitioner. The trial has not been held.

[4] "App. C" refers to Appendix C, Brief for Petitioner.

1990. (J.A. 43). The parties argued the case before the Minnesota Supreme Court on December 4, 1990. On January 18, 1991, the Minnesota Supreme Court reversed the decision of the district court. (J.A. 44-52). The Minnesota Supreme Court held that although the ordinance was overbroad, it was not unconstitutional because it could be narrowly interpreted to prohibit only fighting words and imminent lawless action, expressive conduct outside the protection of the First Amendment. (J.A. 49-50).

SUMMARY OF ARGUMENT

> Roper: So now you'd give the Devil benefit of law!
>
> Thomas More: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> Roper: I'd cut down every law in England to do that!
>
> Thomas More: Oh? And when the last law was down, and the Devil turned round on you – where would you hide, the laws all being flat? . . . [I]f you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

Bolt, *A Man For All Seasons* 37, 38 (1960).

In an effort to legislate social tolerance, the City of Saint Paul passed a broad and sweeping ordinance prohibiting a wide range of intolerant expression. Petitioner, charged with delinquency for allegedly aiding others in

placing a burning cross in a black family's yard, challenges the constitutionality of the ordinance.

A. St. Paul City Ordinance section 292.02 prohibits symbolic expression ("symbol, object") and written expression ("characterization or graffiti") that offends others on the basis of "race, color, creed, religion or gender." By focusing on the direct impact of the expression on its audience ("arouses anger, alarm or resentment"), the ordinance punishes expression based on its content. Having addressed the content of the message, the ordinance goes on to impermissibly discriminate on the basis of viewpoint by specifically prohibiting the display of certain symbols ("a burning cross or Nazi swastika"). Finally, the parameters of the ordinance are unlimited, including within its purview all forums ("on public or private property").

From the beginning, the government has conceded that the ordinance addresses expressive conduct. (J.A. 22); (App. C-1). Since the ordinance proscribes that expression in a content-based fashion, it must be subjected to strict scrutiny. In order to withstand such scrutiny, the ordinance must be supported by a compelling state interest and the law must be narrowly tailored to achieve that interest.

Section 292.02 is neither supported by a compelling interest nor narrowly tailored to meet such an interest. The City of St. Paul has no legitimate objective in regulating politically unpopular or upsetting expressive conduct. To the extent such expression merely causes discomfort or is unsettling to its audience, it is fully protected by the First Amendment. Where the expression

involves illegal conduct, general penal laws directly address and punish such activity. Even assuming the City has demonstrated a compelling state interest, the ordinance is not narrowly drawn to achieve that interest. Instead, the sweeping ambit of the ordinance precludes a wide range of constitutionally protected expression.

B. The Minnesota Supreme Court tried to narrow this substantially overbroad law by limiting its application to "fighting words" or "imminent lawless action". Such a construction leaves intact many of the overbroad features of the ordinance and exchanges vagueness or functional overbreadth for the little overbreadth that it eliminates. The language and meaning of the ordinance is simply not subject to a narrowing construction. Such a construction would create a new law which effectively makes illegal that activity that the First Amendment does not protect. The ordinance has no core of constitutionally proscribable conduct since it is not possible to define a precise category of expression protected by the First Amendment which can be clearly stated to fall outside the reach of this narrowly construed ordinance. It is thus left to the discretion of law enforcement officials, prosecutors, and judges, to determine when an offensive expression has become unprotected as an instance of "fighting words". Narrowly construed, the ordinance continues to have a significant chilling effect on protected speech and expression.

The First Amendment protects unpleasant and unpopular expression, including expression which the majority of citizens may consider intolerant. If such expression goes unprotected, the "legislatures, courts, or dominant political or community groups," would become

the arbiters of what ideas are acceptable and may be expressed. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). This Court has held that the First Amendment protects expression which reflects unpopular minority opinion. The City of St. Paul undeniably transgresses constitutional boundaries when it seeks to regulate expression premised solely on the majority's view of the political acceptability of the expression. With no core of constitutionally proscribable conduct, this ordinance does not fall within any exception to the freedom of speech clause of the First Amendment. St. Paul City Ordinance section 292.02 should be declared unconstitutional by this Court.

ARGUMENT

I.

ST. PAUL CITY ORDINANCE SECTION 292.02 IS SUBSTANTIALLY OVERBROAD ON ITS FACE IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

As a broadly drafted law regulating speech and expression, section 292.02 is subject to a constitutional challenge as written even though a more narrowly drawn statute would be valid as applied to the conduct of the person before the Court. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). Further, the overbreadth of this ordinance is "not only . . . real, but substantial." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The likelihood of impermissible application of the ordinance is great and, as the chilling effect on conduct is also significant, petitioner challenges section 292.02 on its face. In doing so, he also

asserts his right to be judged in accordance with a constitutionally sound law. Monaghan, *Overbreadth*, 1981 S.Ct. Rev. 1, 37.

When any overbroad law attempts to regulate expression on the basis of its content, it is subject to strict constitutional scrutiny. The government must demonstrate a compelling state interest and show that the law was narrowly tailored to achieve that legitimate goal. *Boos v. Barry*, 485 U.S. 312, 321 (1988). St. Paul City Ordinance section 292.02 reaches substantial areas of protected speech and expression. In doing so, it does not serve any compelling state interest and is not narrowly drawn to reach only those areas of expressive conduct that may be legitimately regulated by the government. The primary effect of this ordinance is to restrict protected expression in an overbroad manner.

A. The Ordinance Seeks To Regulate Protected Expressive Conduct, Including Symbolic And Written Speech, On The Basis Of The Content Of The Expression.

"Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

From the beginning of this case, the government has conceded that the expressive conduct proscribed by this ordinance possesses sufficient communicative elements to fall within the parameters of the First Amendment. (J.A. 22); (App. C-1). The ordinance clearly addresses expression that attempts to "convey a particularized message," and such expression likely "would be understood by

those who viewed it". *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Consequently, the government: "[C]annot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is expressive, as it is here." *Texas v. Johnson*, 491 U.S. 397, 416 (1989).

Thus the display of symbols has long been recognized as expressive conduct and this Court has held that laws which proscribe the display of symbols, precisely *because* of the message they convey, are unconstitutional. *See United States v. Eichman*, 496 U.S. ___, 110 S.Ct. 2404, 2409 (1990) (burning flag); *Spence v. Washington*, *supra* (defacing flag); *Schacht v. United States*, 398 U.S. 58 (1970) (military uniforms worn in presentation critical of American involvement in Viet Nam); *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969) (anti-war black arm bands); *Stromberg v. California*, 283 U.S. 359 (1931) (displaying a red flag).

By its terms, section 292.02 regulates both symbolic conduct ("symbol, object, appellation") and written expression ("characterization or graffiti"). More significantly, this ordinance addresses the communicative impact of that expressive conduct. By including specific symbols (Nazi swastika, burning cross) the ordinance not only regulates the content of the message but is a "censorial statute" directed at particular groups and viewpoints. *Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973); *Cf. Keyishian v. Board of Regents*, 385 U.S. 589 (1967). The ordinance compounds its impermissible reach not only by addressing the content of the expression but by censoring

expression associated with unpopular minorities. "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). By focusing on the content and viewpoint of the offensive expression, the ordinance attempts impermissibly to protect and shield its audience. "[A]ny attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Id.* at 797.

In *Boos v. Barry*, 485 U.S. 312 (1988), this Court subjected, to the most exacting scrutiny, a content-based restriction on political speech in a public forum. Striking down the first part of that law containing a "display" clause prohibiting signs with political messages, the Court noted that the clause "operates at the core of the First Amendment by prohibiting (picketers) from engaging in classically political speech". *Id.* at 318. The stated interest in that case, the need to protect "the dignity of foreign diplomatic personnel" by shielding them from the display of signs with insulting messages, *id.* at 322, was rejected as an impermissible attempt to protect an audience. The Court stated:

> As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment . . . [A] 'dignity' standard, like the 'outrageousness' standard that we rejected in *Hustler*, is so inherently subjective that it would be inconsistent with our long standing refusal to (punish speech) because the speech in question

> may have an adverse emotional impact on the audience.

Id. at 322; *Cf. Hustler v. Falwell*, 485 U.S. 46, 55-56 (1988).

The Court further rejected the contention that the real concern of the display clause was not the suppression of speech but rather the "secondary effect" of shielding diplomats from speech that offended their "dignity." *Boos v. Barry*, 485 U.S. at 320-321. In citing *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the Court made it clear that "secondary effects":

> refer[s] to secondary features that happen to be associated with a particular type of speech that have nothing to do with its content, whereas, here, the asserted justification for the display clause focuses only on the content of picket signs and their primary and direct emotive impact on the audience.

Id. at 320.

The triggering language of St. Paul City Ordinance section 292.02, "arouses anger, alarm or resentment," could be used to describe the feelings of any audience when ridiculed outrageously, politically criticized in an undignified manner, or exposed to other forms of personally offensive expression. An "offensiveness" standard is as inherently subjective as a "dignity" standard or an "outrageousness" standard. St. Paul City Ordinance section 292.02 focuses directly on the content of the symbols and characterizations it prohibits and on the direct emotive impact of the expressive conduct.

B. There Is No Compelling State Interest Served By This Law And The Ordinance Is Not Narrowly Drawn To Achieve Any Legitimate Interest.

"For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are express." *NAACP v. Button*, 371 U.S. 415, 445 (1963).

When, as here, a government regulation is directed at and infringes upon constitutionally protected areas, including content-based expression, the government must demonstrate that a compelling state interest is furthered by the regulation. *Boos v. Barry*, 485 U.S. 312, 321 (1988). In this case, the government has failed to satisfy this burden.

The Minnesota Supreme Court implicitly acknowledged that the ordinance was content-based by noting in support of its decision the "compelling governmental interest in protecting the community against bias-motivated threats to public safety and order," citing *Village of Schaumburg v. Citizens For A Better Environment*, 444 U.S. 620, 637 (1980), as authority for this conclusion. *In re R.A.V.*, 464 N.W.2d 507, 511 (Minn. 1991); (J.A. 51).[5] However, in finding the law unconstitutionally overbroad, this Court's decision in *Schaumburg* does not support the state court's conclusion. *Id.* at 637. Although this Court recognized a legitimate state interest in regulating door-to-door solicitations, it also found that the interest was only

[5] The government has likewise advanced only public safety concerns as the interest of the ordinance. (J.A. 25).

"peripherally promoted" by the regulation before it. *Id.* at 636. More significantly, this Court found that the village's interest could be served by "measures less intrusive" of First Amendment interests, stating that penal laws existed which could directly punish the fraudulent misrepresentations which concerned the state. *Id.* at 636-37.

The government has not articulated any other legitimate interest to be served by the ordinance. The references of the Minnesota Supreme Court to "protecting the community" against "bias-motivated threats," reflect the general governmental concern in maintaining public safety and order. As in *Schaumburg*, general penal laws are available to punish any conduct and expression that is properly subject to regulation.

Petitioner was also charged with delinquency on the basis that his conduct constituted an assault, in violation of Minnesota Statutes section 609.2231(4).[6] The petitioner still awaits trial on that allegation. The law prohibiting terroristic threats[7] may be applicable in characterizing or defining the alleged conduct in this case. Other general statutes, which also may be used to regulate similar criminal conduct include: trespass, Minnesota Statutes section

[6] An "assault" is defined by statute as "(1) An act done with intent to cause fear in another of immediate bodily harm or death; or (2) The intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02(10).

[7] Minn. Stat. § 609.713(1) provides: "Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in reckless disregard of causing such terror . . . may be sentenced to imprisonment for not more than five years."

609.605(1)(b)(7) (enhancement provided for bias-motivated offenses); disorderly conduct, Minnesota Statutes section 609.72(1); interference with privacy, Minnesota Statutes section 609.746(2); and criminal damage to property, Minnesota Statutes section 609.595.[8] Since existing general criminal laws satisfy the state's interest in maintaining order, this ordinance is unnecessary to further this interest.

Section 292.02 should be scrutinized under the same analysis this Court used in *Schaumburg*: "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation is the touchstone. . . ." *Id.* at 637 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

It would appear that the real interest advanced by the ordinance is that of increasing social tolerance by prohibiting intolerant expressions regarding race, color, creed, religion, and gender. While the government may have an interest in increasing understanding among its citizens, it may not promote this interest by regulating individual opinion and expression. Government may not seek to control individual expression as a means of encouraging certain viewpoints, including racial and religious tolerance, even if such viewpoints are widely held. The notion of a "consensus" is irrelevant to the protections of the First Amendment or to any government regulation of expression. "[T]he Government may not prohibit the expression of an idea simply because society finds the

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[8] Minnesota law also permits an individual who is subjected to harassment to obtain a restraining order, the violation of which is a misdemeanor. Minn. Stat. § 609.748.

idea itself offensive or disagreeable." *United States v. Eichman*, 496 U.S. ___, 110 S.Ct. 2404, 2406 (1990).

Assuming *arguendo* that there is some legitimate state interest which would permit the prohibition of speech and expression which "arouses anger, alarm or resentment in others," St. Paul City Ordinance section 292.02, was not narrowly tailored to achieve even that goal. *Boos v. Barry*, 485 U.S. 312, 329 (1988).[9] "It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Communications, Inc., v. FCC*, 492 U.S. 115, 126 (1989). The language of the ordinance itself makes clear the government's failure to tailor the legislation to achieve any compelling interest.

1. *"Whoever places on public or private property. . . ."* St. Paul City Ordinance section 292.02.

The ordinance as written is applicable to *all* areas of the city. The ordinance, therefore, enjoins expression in traditional public forums, designated public forums, a citizen's private property, and private property of another with consent. *See, e.g., Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45, 46 (1983); *United States v. Grace*, 461 U.S. 171, 177-78 (1983). The wholesale inclusion of all such protected forums demonstrates the substantial overbreadth of this portion of the ordinance. The remaining location to which the ordinance could

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[9] *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960): "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

apply, private property without the owner's consent, is already precluded by existing penal laws without regard to the content of the expression.

> 2. *"[S]ymbol, object, appellation, characterization, or graffiti, including but not limited to a burning cross or Nazi swastika. . . . "* St. Paul City Ordinance section 292.02.

The sweeping language of the ordinance regarding types of prohibited expression also shows that it is viewpoint-based. The methods of expression prohibited can be classified as follows: (a) symbolic conduct – "symbol, object, appellation" and (b) written expression – "characterization or graffiti." This language demonstrates the substantial overbreadth of forbidden expression and again illustrates the government's comprehensive approach.

The language of the ordinance prohibits specific symbols including, at a minimum, "a burning cross or Nazi swastika." These two symbols communicate definite, though unpopular, political viewpoints.[10] Over twenty years ago, this Court reversed a criminal conviction, for advocacy of violence as a means of reform, based in part on a film showing the burning of a cross. *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969). Since this decision, lower courts have struck down laws regulating the display of symbols, including Nazi swastikas. *See Collin v. Smith*, 578 F.2d 1197 (7 Cir.), *cert. denied*, 439 U.S. 916 (1978); *see also*

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[10] "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943).

Knights of Ku Klux Klan v. Martin Luther King, Jr. Worshippers, 735 F. Supp. 745 (M.D. Tenn, 1990).

The ordinance conceivably prohibits such written expression as drawings, cartoons, depictions, or pictures. Addressing these types of "characterizations," this Court recently acknowledged the application of First Amendment protections to such expression: "[G]raphic depictions and satirical cartoons have played a prominent role in public and political debate. . . . From the viewpoint of history, it is clear that our political discourse would have been considerably poorer without them." *Hustler Magazine v. Falwell*, 485 U.S. 46, 54-55 (1988).

This Court has repeatedly emphasized that the idea that government may regulate expression on the basis that it offends certain groups is repugnant to the First Amendment. *See, e.g., United States v. Eichman, supra* at 2406; *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Street v. New York*, 394 U.S. 576, 592 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). To allow an audience to determine what expression is permitted, based on its agreement or disagreement with the content of the message, would provide a "heckler's veto" to the expression of an opposing viewpoint. *See, e.g., Cohen v. California;* 403 U.S. 15, 23 (1971). Unpopular ideas, such as separation of the races, racial supremacy, and religious, ethnic, or gender based intolerance as reflected by symbolic expression and written speech cannot be restricted in the overly broad manner of section 292.02.

> 3. *"[W]hich one knows or has reasonable grounds to know arouses anger, alarm or resentment in*

others. . . . " St. Paul City Ordinance section 292.02.

This language reflects the central purpose of the ordinance: to prohibit expression which offends, angers, or disturbs others. It is only this type of audience reaction that precipitates application of the ordinance. This Court, however, has repeatedly noted that expression which is "provocative and challenging," has "profound unsettling effects," and "invites dispute, induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger" is among the "high purposes" of the First Amendment. *Terminiello v. Chicago, supra* at 3-4; *See also United States v. Eichman, supra* at 2406; *Street v. New York, supra* at 591. Expression which the ordinance would prohibit is indistinguishable from that expression protected by the First Amendment.

4. *"[O]n the basis of race, color, creed, religion or gender. . . . "* St. Paul City Ordinance section 292.02.

The number of groups designated for protection by the ordinance is indicative of the government's approach. By specifying two hate symbols, the ordinance appears to be aimed primarily at protecting African Americans and Jewish Americans from intolerance. The ordinance clearly could be applied to other named groups. A cross may be equally disturbing to and resented by non-Christians and atheists. Particular treatment of a cross, or another religious symbol, may be troubling to followers of other religions. The Star of David may be seen as a Zionist symbol and so offend or threaten Arab and Palestinian Americans. Many different symbols or characterizations may conceivably disturb or anger Native Americans,

Asian Americans, Hispanic Americans, and other Americans proud of their ethnic heritage.[11]

Since "creed" is addressed in the ordinance in addition to religion, this portion of the ordinance could apply to any "statement of belief."[12] Citizens of a southern state or with a southern heritage could argue that the display of a confederate flag reflects their regional pride. Under the ordinance, this belief could be subordinated to the feelings of an African American who may view the confederate flag as a continuing symbol of racism. Since the ordinance does not require a showing of explicit intent, the violation of this law will always depend on the subjective response of the public.

The government amended this ordinance in 1990 to add "gender" to the list of protected groups who may be offended by the display of symbols or expressions. This amendment reflects an inherent problem with this type of law: it is always subject to the changing political climate of the community and the consensus of the majority regarding acceptable expressive conduct. Left unchecked,

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[11] One commentator refers to the "balkanization" among groups in the university context: "[S]tudents from different backgrounds came to college thinking of themselves as 'individuals' or 'Americans' but, once at Berkeley, began to think of themselves as 'African American, Asian American or whatever.' [E]ach group accuses other groups of being closed and not receptive" and "each group complains about being stereotyped." D'Souza, *The Illiberal Education* 46, 47 (1991).

[12] "Creed n . . . 2 any statement of belief, principles, etc." *Webster's New World Dictionary* 148 (1987).

law-making bodies will continue to court political support by enlarging the list of protected groups while precluding unpopular minority expression.[13]

The classification of "gender" as one of the protected subgroups substantially increases both the overbreadth of the ordinance and the chilling effect on expressive conduct. The ordinance could conceivably be applied against a pro-choice advocate for the display of a clothes hanger as well as against a pro-life advocate for the display of a picture of a fetus. Since the ordinance covers all forums and bans many types of expressive conduct, it could serve to inhibit virtually any peaceful demonstration regarding many of the issues that define us as a pluralistic society.

In attempting to silence certain expression, this ordinance indirectly represses thoughts and ideas as well. The dangerous result of such laws or codes, whether in the City of St. Paul or on college campuses, is the "pall of orthodoxy" that is cast over the community.[14] As one federal judge, comparing today's climate to the McCarthy era of the 1950s, recently wrote in a letter to the Dartmouth Club:

> The senator from Wisconsin sought to disarm his opponents by calling them communist or

[13] The current experience with university speech and conduct codes also has led to expanding prohibitions on offensive expression, "on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status. . . ." *Doe v. University of Mich.*, 721 F.Supp. 852, 856 (E.D. Mich. 1989).

[14] *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

> communist sympathizers – and thereby robbed them of moral legitimacy. The Dartmouth Administration and many of the faculty use "racism" and "sexism" and other "isms" loosely in the same fashion to label their critics as morally inferior. I find both approaches equally offensive. . . .

Silberman, "A Letter to the Dartmouth Club," *1990 First Amendment Law Handbook* 146 (1990).

St. Paul City Ordinance section 292.02 reflects an effort by the government to suppress expressive conduct in a sweeping and substantially overbroad manner. The unambiguous purpose of the ordinance is to ban symbolic and written expression when the majority finds it offensive or demeaning. In an effort to legislate civility, the government has implicated a wide area of expressive conduct that it may not constitutionally regulate. The government's interest in maintaining safety and order is satisfied by existing general criminal laws. The ordinance is not narrowly tailored to meet any other legitimate state interest.

II.

ST. PAUL CITY ORDINANCE SECTION 292.02 CANNOT BE NARROWLY CONSTRUED WITHOUT CONTINUING TO VIOLATE OVERBREADTH AND VAGUENESS PRINCIPLES OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The language of St. Paul City Ordinance section 292.02 is "plain" and its meaning "unambiguous" in its application to protected expression and speech. As a result, it is not susceptible to a limiting construction. Any attempt to limit the ordinance to "fighting words" or

"imminent lawless action" would not cure any of its constitutional infirmities and would result in an unconstitutionally vague law. Moreover, a narrowing interpretation fails because it is impossible to give the ordinance effect without imposing unconstitutional content-based restrictions on expression.

There are no exceptions to the First Amendment which permit a government to regulate expressive conduct in this manner. No new exceptions should be created in an academic attempt to legislate social tolerance. Making intolerant expression illegal will not increase understanding; it will only vitiate the First Amendment guarantee of free speech that has protected our cultural diversity. This Court should follow established First Amendment analysis and not create a new category of prohibited expressive communication.

A. The Ordinance Is Not Susceptible To A Narrowing Construction Because It Has No Core Of Easily Identifiable And Constitutionally Proscribable Conduct Which Falls Outside The Protection Of The First Amendment.

"In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Kolender v. Lawson*, 416 U.S. 352, 355 (1983); *Cf. Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5 (1982). However, "the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements". *Virginia v. American Bookseller's Association*, 484 U.S. 383, 397 (1988). When faced with an ordinance which by its

plain terms was not easily susceptible to a narrowing construction, this Court held that the ordinance was invalid. *Erznoznik v. City of Jacksonville*, 442 U.S. 205, 216 (1975). Noting that the possibility of a limiting construction appeared "remote", the Court refused to apply a narrowing construction even when one appeared available "because the rewriting of the ordinance would be necessary to reach that result". *Id.* at 216 n.15. In that case the Court acknowledged that the city involved may even have had a legitimate interest in passing an ordinance which regulated movies on the basis of their content, but stated that the ordinance, "did not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." *Id.* at 217-18.

This Court has not hesitated to invalidate other laws that were substantially overbroad, inhibiting wide areas of expressive conduct and providing little foundation for narrow construction. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). These cases and others illustrate how a narrowing construction of section 292.02 ultimately fails.

In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the commission argued that a regulation it had enacted banning all First Amendment activities within a certain section of the airport was permissible because it addressed its regulation evenly to the public and had only a general application that could be narrowly construed on a case-by-case basis. This Court

rejected that argument and held that no conceivable governmental interest could justify such an absolute prohibition of speech:

> The resolution therefore does not merely reach the activity of respondents at L.A.X.; it prohibits even . . . the wearing of campaign buttons or symbolic clothing . . . [I]t is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable.

Board of Airport Commissioners of City. v. Jews for Jesus, Inc., 482 U.S. at 574-76.

The Court noted that any limiting construction would still result in a substantial chilling effect because airport officials would retain the power to decide whether any given activity violated the regulation. *Id.* at 576.[15]

St. Paul City Ordinance section 292.02 cannot be limited by any narrowing construction, for such a construction is of little usefulness in reducing the overbreadth of the ordinance. Symbols and characterizations can be expressed in a multitude of ways other than on t-shirts and buttons as cited in *Board of Airport Commissioners v.*

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[15] "Such a limiting construction, however, is of little assistance in substantially reducing the overbreadth of the resolution. Much non-disruptive speech – such as the wearing of a t-shirt or button that contains a political message . . . [i]s still protected speech even in a non-public forum." *Board of Airport Commissioners v. Jews for Jesus, Inc., id.* at 576 (citing *Cohen v. California*, 403 U.S. 15 (1971)).

Jews for Jesus, Inc. Methods of expression conceivably could include other forms of clothing including athletic caps or jackets, car bumper stickers, pickets and even political campaign signs. To ascertain which form of expressive conduct is permissible and which rises to the level of "fighting words" makes a case-by-case adjudication intolerable. This ordinance would continue to chill expression throughout the City of St. Paul. Like the statute in *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 948, section 292.92 "operates on a fundamentally mistaken premise," here, that viewpoint-based laws are a permissible method of promoting social tolerance. As a result, the ordinance is not unconstitutional in part but rather it is inherently flawed.

The Minnesota Supreme Court tried to cure the overbreadth of section 292.02 by finding it could be narrowly interpreted to prohibit only expressive conduct which "falls outside First Amendment protection". (J.A. 44).[16] In so holding, the court attempted to narrowly construe a substantially overbroad law which does not permit such a construction. As construed by the court, the ordinance is vague or functionally overbroad and the chilling effect on protected expressive conduct remains.[17]

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[16] "[S]tatutes narrowed merely by an assertion that they reach only as far as the Constitution permits, without citation of more specific limitations, remain functionally overbroad." Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 907 (1991).

[17] "[F]irst Amendment overbreadth and vagueness doctrine have common rationales . . . First Amendment vagueness

(Continued on following page)

Similarly, in *City of Houston v. Hill*, 482 U.S. 451 (1987), this Court addressed an ordinance of substantial overbreadth; its literal wording prohibited a significant range of protected speech. The City of Houston defended the wide sweep of its ordinance by arguing that it was essential to the maintenance of public order. *Id.* at 459. The Court rejected this argument and held that the ordinance was susceptible to regular application to protected expression and that it was not susceptible to a limiting construction because its language was plain and its meaning unambiguous. "The enforceable portion of this ordinance is a general prohibition of speech that 'simply has no core' of constitutionally unprotected expression to which it might be limited." *Id.* at 468.

St. Paul City Ordinance section 292.02 openly prohibits any expressive conduct whether symbolic or written that could disturb various groups for any reason at any time and at any place within the city limits. The ordinance is not readily susceptible to a limiting construction and it does not address any core of easily identifiable and constitutionally proscribable expression. *Secretary of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 (1984).

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doctrine – as distinct from ordinary or non-First Amendment vagueness doctrine – is best conceptualized as a subpart of First Amendment overbreadth doctrine." Fallon, *id.* at 904. Fallon refers to this vagueness as "functional overbreadth" *Id.* at 907.

B. The Ordinance Cannot Be Narrowed To Fit Established Exceptions To The First Amendment Without Continuing To Have A Significant Chilling Effect On Protected Expression.

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the court to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

Kolender v. Lawson, 461 U.S. 352, 358 n. 8 (1982); *Cf. United States v. Reese*, 92 U.S. 214, 221 (1876).

This Court originally set forth the "fighting words" doctrine in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The doctrine has been interpreted as a very narrow exception to the First Amendment freedom of speech clause for "words likely to cause an average addressee to fight." *Id.* at 573. Since *Chaplinsky*, this Court has consistently limited the "fighting words" doctrine,[18] holding that offensive language can be statutorily prohibited only if it is extremely personally offensive, *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973), uttered in a face-to-face manner, *Lewis v. New Orleans*, 408 U.S. 913 (1972) (Powell, J. concurring), to a specific individual not to a group, *Gooding v. Wilson*, 405 U.S. 518 (1972), and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response in a reasonable

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[18] "[T]he court has overturned every single fighting words conviction that it has reviewed since *Chaplinsky*." Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 Duke L.J. 484, 510 (1990).

person to whom the remarks were made. *Id.* All of these elements must be present before the fighting words exception may be considered. *See* Gard, *Fighting Words and Free Speech*, 58 Wash. U.L.Q. 531, 536-37 (1980).

This Court has acknowledged that "one man's vulgarity is another's lyric" and has indicated that those who would restrict speech that seems profane or upsetting carry a heavy burden. *Cohen v. California*, 403 U.S. 15, 25 (1971). It is not enough that there be a possible tendency for certain speech to provoke violent reaction, there must be an immediate threat of violence. *See, e.g., Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974). Commentators have observed that abusive epithets do not often result in reflexive violence.[19] The likelihood of an immediate breach of the peace is even more remote when the expression is symbolic or written. Consequently, not even the asserted governmental interest in keeping the peace or in maintaining order would appear furthered by the "fighting words" exception.

A distinction should be made between expressions of dislike or disrespect for another that brings forth an essentially ideological response, angry or not, and that inherently provocative speech that results in reflexive violence.[20] The first type of expression may even result in some type of reaction but the outrage of the recipient at the content of the message cannot be allowed to censor the expression. "[U]nder our Constitution the public expression of ideas may not be prohibited merely because

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[19] *See, e.g.*, Gard, *supra* at 580.

[20] *See, e.g.*, Gard, *supra* at 540.

the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). The government may not penalize expression because it disagrees with the ideological message conveyed. *Schacht v. United States*, 398 U.S. 58 (1970).

This Court has also noted that under certain limited circumstances advocacy likely to provoke "imminent lawless action" may be regulated. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In that case this exception was restricted to laws involving expression directed to as well as likely to incite imminent lawless action. *Id.* at 447-48. Those laws not limited in scope to this type of incitement have been struck down. *See NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974). Even where angry speech was later followed by violence, this Court nonetheless held that the speech "did not transcend the bounds of protected speech set forth in *Brandenburg*." *NAACP v. Clairborne Hardware Co., supra* at 928. It is also not enough that one advocate violence in the abstract. *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam).

Neither the "fighting words" exception nor the "imminent lawless action" exception clarify the permissible reach of section 292.02. By its very nature, symbolic and written expression may stir some to anger by reason of its content. Yet, narrowing the ordinance to reach "fighting words" or "imminent lawless action" is ineffective due to the breadth of the language used in drafting the ordinance. Thus, narrowing the "arouses anger, alarm or resentment in others" clause leaves intact the overbreadth of the remaining terms. To the degree the narrowing construction attempts to limit the impact of the

ordinance on protected expression, it fails in its objective. Those expressions which rise to the level of "fighting words" or "imminent lawless action" as narrowly interpreted by the decisions of this Court constitute only a small portion of expression addressed by this ordinance. Any reduction in the chilling effect of the ordinance is equally negligible. The First Amendment will not permit such a violation of traditionally protected areas by a regulation of such questionable utility.

To construe this ordinance narrowly, as applying to only those areas unprotected by the First Amendment, results in an additional problem of constitutional dimension, for persons "of common intelligence must necessarily guess at its meaning." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). The ordinance fails to provide any certainty in guiding citizens in their conduct or police in their enforcement of the law. "[T]he more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Cf. Smith v. Goguen*, 415 U.S. 566, 574 (1974). *See* Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 904 (1991).

The vagueness of the narrowly construed ordinance is similar to the vagueness of a law which merely states that "non-First Amendment expression is prohibited." No guidance is provided regarding the boundary between permissible and impermissible expression. No narrowing construction is possible because there is no precise

category of protected expression which can be clearly delineated from the permissible reach of the ordinance.[21] Selective or arbitrary enforcement of this law would be based on the political persuasion of those in power. It is likely that such a substantially overbroad ordinance would be violated frequently since section 292.02 proscribes so much expressive conduct. It is this potential for violation, not the likelihood of prosecution, which must be addressed.[22] The failure or success of such prosecutions is also irrelevant. "So long as the statute remains available to the state the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of the ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965). Expression, whether, written, or symbolic, will be chilled, as various viewpoints remain subject to prosecution if they differ from views of the majority.[23]

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[21] "[A]n attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application . . . [T]his course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty." *Aptheker v. Secretary of State*, 378 U.S. 500, 516 (1964).

[22] "It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and overbroad statute lends itself to selective enforcement against unpopular causes." *NAACP v. Button*, at 435.

[23] "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in Court that he spoke out of hatred; even if he did speak out of hatred,

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The proponents for regulating expression in the manner of St. Paul City Ordinance section 292.02 may find that they too will suffer from its sweeping parameters. The broad range of objectionable expressions combined with the increasing number of protected groups could lead to a general climate of repressed expression. An unanticipated result may be enforcement against the very groups targeted for protection.[24] The direction of the winds of political acceptability may change and such laws could be used to reduce their freedom of expression. Forcing intolerant opinions and ideas underground may result in the glorification of racist, sexist, or anti-semitic activity.[25] As a lawyer who defended the First Amendment right of the American Nazi Party to march in Skokie, Illinois, (*Collin v. Smith*) stated:

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utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth". *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)).

[24] "Thus, the record of the actual implementation of the fighting words doctrine demonstrates that . . . such a speech restriction will be applied discriminatorily and disproportionately against the very minority group members whom it is intended to protect." *Strossen, supra* at 512.

[25] "The efforts of the administration at Michigan and other schools to regulate and enforce a social etiquette have created an enormous artificiality of discourse among peers, and thus have become an obstacle to that true openness that seems to be the only sure footing for equality. For when sentiments are outlawed, they tend to go beneath the surface . . . [t]he consequence of such policies, therefore, is to promote rebellion in the name of harmony, to exacerbate bigotry while claiming to fight it. . . . " D'Souza, *The Illiberal Education* 156 (1991).

> Why did the Nazi message fall on such deaf ears? Revolutionaries and advocates of destruction attract followers readily when the society they wish to overturn loses legitimacy. Understanding this process, revolutionaries try to provoke the government into using repressive measures. They rejoice, as the American Nazis did, when their rights are denied to them; they count on repression to win them sympathizers.[26]

C. This Court Should Not Create Any New Exceptions To The First Amendment Protection Of Free Speech.

Recognizing the difficulty in applying the "fighting words" and "imminent lawless action" exceptions to offensive or intolerant expression, some proponents of regulation have suggested new methods of encroaching upon the freedom of speech clause. One commentator would divide the population into "dominant group" status and "subordinated group" status. If a subordinated group member were a target of the "rhetoric of racial inferiority" such speech would be prohibited outright.[27] Another commentator would prohibit hate speech on the basis of the "psychic harm" dictum found in *Chaplinsky v. New Hampshire, supra* at 572.[28] This Court, however, has never relied upon *Chaplinsky's* "psychic harm" dictum to

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[26] Neier, *Defending My Enemy: American Nazis, The Skokie Case, And The Risks Of Freedom* 170-71 (1979).

[27] Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L.R., 2320, 2355-56, 2361-64 (1989).

[28] Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech On Campuses*, 1990 Duke L.J. 431, 462 (1990).

sustain a fighting words conviction. In fact, since *Chaplinsky*, this Court has upheld a number of cases protecting speech that was allegedly offensive and could theoretically have caused psychic injury.[29]

Laws similar to section 292.02 have been enacted throughout the nation in an attempt to counter "hate speech". Consequently, the ordinance mirrors many speech and conduct codes in both public and private universities across the nation. Such codes and conduct regulations are proliferating. According to a survey by the Carnegie Foundation for the Advancement of Teaching, over sixty percent of the responding colleges and universities had developed or were developing written policies on bigotry, racial harassment or sexual harassment on campus. Of the remaining schools, eleven percent were working to establish similar restrictions on written, spoken, and symbolic speech. *A Special Report: Campus Life in Search of Community* (Princeton University Press 1990 at 19, 122, 138). Contrary to this trend, a bill was recently introduced in Congress that seeks to extend First Amendment guarantees of freedom of speech to private schools and universities.[30]

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[29] Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 Duke L.J. 484, 514 (1990) (citing *United States v. Eichman, supra, Hustler Magazine v. Falwell, supra, Spence v. Washington, supra, Cohen v. California, supra, Street v. New York, supra,* and *Terminiello v. Chicago, supra).*

[30] H.R. 1380 Collegiate Speech Protection Act of 1991 seeking to amend Title VI of the Civil Rights Act of 1964 introduced by Representative Hyde on March 12, 1991.

A university campus is a virtual microcosm of a community such as the City of St. Paul. Just as St. Paul has both public and private forums, the university campus contains within its boundaries a mall, classrooms, and areas of residence. Whether it be within the limits of the City of St. Paul or on a campus elsewhere in the nation, substantially overbroad laws or regulations which suppress expressive conduct on the basis of viewpoint obscure our goal of a tolerant pluralistic society.[31]

Any expansion of narrowly recognized exceptions to the First Amendment would further diffuse the nearly indistinguishable line between permissible and proscribable expression. Further restrictions might curtail some offensive expression but only at the cost of chilling a great deal of protected speech. The result may well be the silencing of political debate, the encouraging of orthodoxy, and the endangering of the individual's right to dissent. To enforce a notion of civility to the point of forbidding unpopular minority expression is to underestimate the citizens of this country at the cost of our basic right of self-expression. This Court should not ignore the guidance of established First Amendment analysis and create a new category of expressive communication subject to regulation.

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[31] "For speech that attacks and challenges community values, the act of toleration serves to both define and reaffirm those values; the act of tolerance implies a contrary belief and demonstrates a confidence and security in the correctness of the community norm. Through toleration in short, we create the community, define the values of that community, and affirm a commitment to and confidence in those values." Bollinger, *The Tolerant Society* 158 (1986).

CONCLUSION

The judgment of the Supreme Court of Minnesota upholding the constitutionality of St. Paul City Ordinance section 292.02 should be reversed and section 292.02 should be held unconstitutionally overbroad in violation of the First Amendment to the United States Constitution.

Respectfully submitted,

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APPENDIX A

List of Cases

The Minnesota Supreme Court and Court of Appeals have upheld the constitutionality of a variety of disorderly conduct statutes and ordinances, similar to the ordinance in this case, against challenges that the laws were overbroad.

City of Little Falls v. Witucki, 295 N.W.2d 243 (Minn. 1980)

City of St. Paul v. Mulnix, 232 N.W.2d 206 (Minn. 1975)

In the Matter of the welfare of S.L.J., 263 N.W.2d 412 (Minn. 1978)

State v. Lynch, 392 N.W.2d 700 (Minn. App. 1988)

The guarantee of free speech protected by the First Amendment is not absolute. The United States Supreme Court has ruled that "fighting words" are *not* protected speech.

Chaplinsky v. New Hampshire, 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1942)

The United States Supreme Court does not support review of a statute only on its face – constitutional analysis should be conducted in light of the specific facts of any case.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 86 L.Ed. 394, 105 S.Ct. 2794 (1985)

Appellate courts have upheld convictions for cross burning activities.

State v. Miller, 629 P. 2d 748, 6 Kan. App. 432 (1981)

U.S. v. Salyer, 893 F.2d 113 (6th Cir. 1989)

/s/ Leslie Norsted
Leslie Norsted
Asst. Ramsey County
Attny.

/s/ J. Lindsay Flint
J. Lindsay Flint
Asst. Ramsey County
Attny.

APPENDIX B

MEMO

TO: The Honorable Charles A. Flinn

FROM: Edward J. Cleary

DATE: July 10, 1990

RE: *State vs. R.A.V.*

ISSUE: Constitutionality of St. Paul City Ordinance Section 292.02

ST. PAUL CITY ORDINANCE SECTION
292.02 DISORDERLY CONDUCT

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed or religion commits disorderly conduct and shall be guilty of a misdemeanor.

FIRST AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES
FREEDOM OF RELIGION, SPEECH AND PRESS;
PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTION OF THE
STATE OF MINNESOTA
ARTICLE I, SECTION 3
LIBERTY OF THE PRESS

> The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

It is the position of Defendant R.A.V. that St. Paul City Ordinance Section 292.02 is unconstitutional based on the First Amendment to the United States Constitution and Article I, Section 3 of the Constitution of the State of Minnesota.

Specifically, Defendant R.A.V. contends that since this Ordinance may not be applied to criminalize certain conduct, it is substantially overbroad. Further, it is our position that the Ordinance is fatally vague as well because it turns in part on subjective reactions to prohibited conduct. *Collin vs. Smith*, 578 F.2d 1197, 1207 (1978); see also *Coetes vs. City of Cincinnati*, 402 U.S. 611 (1971).

ANALYSIS

First: *Does the conduct proscribed by the Ordinance constitute expressive conduct?*

In deciding whether the particular conduct possess sufficient communicative elements to bring the First Amendment into play, the question is whether "an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it" *Texas vs. Johnson,*

109 S.Ct. 2533, 2539 (1989). Clearly the conduct proscribed in Section 292.02 constitutes expressive conduct by such a measure. See, *Texas vs. Johnson, Supra.* Obviously the burning of a cross or the wearing of a Nazi swastika constitute expressive conduct. *Collin vs. Smith,* 578 F.2d 1197 (1978).

Second: *Does the State's regulation relate to the suppression of free expression (i.e. is it content-based)?*

Collin vs. Smith, Supra, indicates clearly that the wearing of Nazi armbands and the display of a Nazi party flag are entitled comprehensive protection under the First Amendment. That case involved the famous Skokie, Illinois, march by the Nazis in a Jewish suburb. The ordinance passed by the Village of Skokie attempted to prohibit behavior similar to that proscribed by Section 292.02. The Court therein noted that the Ordinance turned on the *content* of the demonstration. It further pointed out that an analysis of the content restrictions "must begin with a healthy respect for the truth that they are the most direct threat to the vitality of First Amendment rights." *Collin vs. Smith,* 578 F.2nd 1197 at 1202.

Since the Ordinance on its face depends on the likely communicative impact of expressive conduct, the restriction on expression is content based. Thus the political expressions restricted by the Ordinance, are restricted because of the content of the message conveyed. *Boos vs. Barry,* 108 S.Ct. 1157 (1988). As the Court notes in *Texas vs. Johnson, Supra,* at 2544:

> If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply

> because society finds the idea itself offensive or disagreeable.

Section 292.02 thus is a *content-based* restriction on political speech or action in a public or private forum. As such it must be subjected to the most exacting scrutiny. The state must be required to show that "the regulation is necessary to serve a compelling state interest and that is clearly drawn to achieve that end." *Boos vs. Barry, Supra* at 1164. Since the State's regulation is related to the suppression of free expression, *United States vs. O'Brien,* 391 U.S. 367 (1968) is not applicable for it only relates to non-communicative conduct. Clearly conduct proscribed by Section 292.02 is *expressive.*

Third: *Since Section 292.02 is a content-based restriction on expressive conduct in a public forum, can the state show that the Ordinance is necessary to serve a compelling state interest and that is narrowly drawn to achieve that end?*

This Ordinance suffers from the same fundamental flaw as the Flag Protection Act of 1989 ruled unconstitutional in *U.S. vs. Eichman* (110 S.Ct. 2402) (1990). Since the restriction on expression in the Ordinance cannot be justified without reference to the content of the regulated speech, it must be subjected to the most exacting scrutiny as noted above. Here as in *Eichman, supra,* the Government's interest cannot justify its infringement on First Amendment Rights. The Supreme Court has indicated that in public debate "our own citizen must tolerate insulting, even outrageous speech in order to provide adequate breathing space to the freedoms protected by the First Amendment". *Hustler Magazine, Inc. vs. Falwell,* 108 S.Ct. 876 (1988). As the Court notes in *Eichman, supra*:

> Any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment. While flag desecration, like virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures, is deeply offensive to many, the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. *U.S. vs. Eichman, supra,* at 2405. See also *Terminiello vs. Chicago* 69 S.Ct. 894 (1949).

Twice within the past year, the United States Supreme Court in *Texas vs. Johnson, supra* and *U.S. vs. Eichman, supra,* has been forced to reiterate the broad mandate of the First Amendment even in the context of flag burning. In both cases, the Court overturned the law in question because the law:

> Still suffers from the same fundamental flaw; it suppresses expression out of concern for its likely communicative impact. *U.S. vs. Eichman,* 110 S.Ct. 2404 at 2408.

CONCLUSION

Clearly St. Paul City Ordinance 292.02 proscribes expressive conduct. It is a content-based restriction on political speech or action in both public and private forums and is not necessary to serve a compelling state interest nor is it narrowly drawn to achieve any compelling state interest. It simply suppresses expression out of concern for its likely communicative impact which is clearly unconstitutional under United States Supreme Court decisions including the most recent *U.S. vs. Eichman,* 110 S.Ct. 2404 (1990). Because this ordinance may

not be applied to criminalize the conduct that it attempts to criminalize, and because it is susceptible to such an application, it clearly suffers from substantial over-breadth, and further the Ordinance is fatally vague as well because it turns in part on subjective reactions to prohibited conduct. Defendant R.A.V. respectfully asks the Court to find Section 292.02 of the St. Paul City Legislative Code unconstitutional.

Cases attached:

1) *U.S. vs. Eichman*, 110 S.Ct. 2404 (1990) – already provided to the Court.
2) *Texas vs. Johnson*, 109 S.Ct. 2533 (1989) – already provided to the Court.
3) *Collin vs. Smith*, 578 F.2d 1197 (1978).
4) *Boos vs. Barry*, 108 S.Ct. 1157 (1988).
5) *Hustler Magazine vs. Falwell*, 108 S.Ct. 876 (1988).
6) *KKK vs. Martin Luther King, Jr. Worshipers*, 735 F.Supp. 747 (1990).
7) *Brandenburg vs. Ohio*, 395 U.S. 444 (1968).
8) *Godward vs. City of Minneapolis* (Finance & Commerce, June 1, 1990).

APPENDIX C

(SEAL)

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MEMORANDUM

TO: The Honorable Charles A. Flinn, Jr.

FROM: J. Lindsay Flint
Leslie Norsted

DATE: July 13, 1990

RE: State v. R.A.V.

STATE'S ORAL ARGUMENT

Respondent argues that the St. Paul Ordinance in question here, § 292.02, bias-motivated disorderly conduct, attempts to regulate expressive conduct and is therefore within the scope of the First Amendment of the Constitution of the United States and Article I, Section 3 of the Minnesota State Constitution.

The State agrees that the Ordinance does indeed attempt to proscribe expressive conduct. The burning of a cross does express a message and it is, in fact, the content of that message which the St. Paul Ordinance attempts to legislate.

Respondent contends that the Ordinance is substantially overbroad and vague. The Respondent is asking the Court to strike down the entire Ordinance on its face as being in violation of the First Amendment right to free speech.

The Court has held however, that where both conduct and speech are involved, the facial overbreadth of a statute must be both real and substantial, judged in relation to the statute's plainly legitimate sweep, to justify holding it to be void on its face. Statutes are invalid for overbreadth only when the flaw is of substantial concern in the context of the statute as a whole. (*Broadrick v. Oklahoma*, 413 U.S. 615, (1973). This was reiterated by the Court in *Brockett v. Spokane* (1985) when the Court held that a court should not extend it's invalidation of a statute further than necessary to dispose of the case before it. In *Brockett*, the Court held that a state moral nuisance statute, which was allegedly overbroad in that it's reference to material which incites "lust" reached constitutionally protected material should be invalidated only insofar as the word "lust" is to be understood as reaching protected material and not in its entirety. The lower court is to do so when such a limiting construction is feasible and does not invalidate the intent of those enacting the statute.

The Court goes on to cite what it calls two cardinal rules governing federal courts: 1) never anticipate a question of constitutional law in advance of the necessity of deciding it and 2) never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. (*U.S. v. Raines*).

Thus, the court today need only look at the Ordinance as it may be applied to the case before it. That case involves a cross-burning on private property and that alone. So the Court need only look at the Ordinance as it applies to the placing of a burning cross on private property where one knows or has reason to know it will arouse anger, alarm or resentment in others on the basis of race, color, creed or religion.

This disorderly conduct ordinance is very similar to other Minnesota disorderly conduct statutes and ordinances which have been upheld as Constitutional. The Minnesota Supreme Court has followed the rule of the U.S. Supreme Court as outlined in *Brockett*, *Broderick* and *Raines* to narrowly construe such disorderly conduct statutes. To quote the court in *State of Minnesota City of Minneapolis v. Lynch*, "Where a law is facially overbroad because it might restrict protected speech, it must be construed narrowly in order tc survive a constitutional challenge." And that is exactly what the court has done in several cases, beginning with *In the Matter of the Welfare of S.L.J.* The Minnesota Supreme Court has held that disorderly conduct statutes and ordinances are constitutional if the prosecution is for "fighting words". This follows the U.S. Supreme Court case of *Chaplinsky v. New Hampshire*, where fighting words are defined as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction or words which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

The alleged expressive conduct by the Respondent in this case most certainly constitutes "fighting words" by

such a definition. The Supreme Court, in *Texas v. Johnson*, reiterates the rule that generally, the Government has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. A cross burning, in the early morning hours, within the fenced in yard of a black family, new to the neighborhood, by some unknown trespasser or trespassers is personally abusive, it provokes a violent reaction, it inflicts injury and tends to incite an immediate breach of the peace.

Respondent asks the court to equate a cross-burning in the yard of a black family with the burning of an American flag at a political rally as in the *Texas v. Johnson* and most recent *Eichman* case. Each of these cases involved an individual PUBLICALLY burning a flag during a political rally or demonstration. It was accompanied by political rhetoric, done in public view so others could see their protest and it was directed at the government. Respondent also cites *Brandenburg v. Ohio*, a case involving a Ku Klux Klan rally at which a cross was burned. The Court upheld the right of the speaker to advocate the use of force or violation of law during this rally as a political statement. The court was upholding the right of citizens to voice a political opinion at an assembly of an organization, namely the Klan. The court does not even address the cross as it related to the First Amendment but focused on the words and statements of the speaker. In addition, the cross in *Brandenburg* was not burning in the private yard of a black family at night. In fact, there was no one present but Klan members and the press they invited. The cross and it's meaning were not directed at one individual or one family.

One activity, speech at a political rally, is protected political speech, no matter how abhorrent. The other activity, cross-burning in a private yard, represents fighting words – unprotected by the First Amendment and subject to criminal sanctions.

The Respondent also cites *Collin v. Smith*, the well-known Skokie, Illinois march case. Again, the court upholds the right of a group to express their political opinions publically. The Court notes however, "there is room under the First Amendment for the government to protect targeted listeners from offensive speech – when the speaker intrudes on the privacy of the home or a captive audience cannot practically avoid exposure." We submit that placing a burning cross in the fenced in yard of a families home is just such an intrusion of privacy.

The act of burning a cross has been upheld as a terroristic threat in Kansas in the case of *State of Kansas v. Miller*. The Kansas Court of Appeals held that a threat was not limited to a written or oral threat but could also be inferred from a physical act such as "cross burning". The Court looked to all of the circumstances surrounding the "communication" in finding the act a terroristic threat. In *U.S. v. Salyer*, the 6th Circuit U.S. Court of Appeals sustained an upward sentencing departure in a case where a cross was burned at night in the rural, isolated yard of a black family, stating these circumstances made the victims of the act particularly vulnerable. The Court referred to the historical connotation of violence, intimidation and terrorism which is symbolized by a burning cross.

Finally, we ask the Court to reflect on the "content" of the "expressive conduct" represented by a "burning cross". It is no less than the first step in an act of racial violence. It was and unfortunately still is the equivalent of waving of a knife before the thrust, the pointing of a gun before it is fired, the lighting of the match before the arson, the hanging of the noose before the lynching. It is not a political statement, or even a cowardly statement of hatred. It is the first step in an act of assault. It can be no more protected than holding a gun to a victims head. It is perhaps the ultimate expression of "fighting words".

The State asks the court to narrowly review the St. Paul bias-motivated disorderly conduct ordinance and uphold it as a Constitutional restriction on free speech under the First Amendment as unprotected "fighting words".